STATE OF ILLINOIS

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ILLINOIS COMMERCE COMMISSION

Office of General Counsel
May 26, 1999

VIA AIRNET EXPRESS

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

RE: The Illinois Commerce Commission's Initial Comments to the Second Further Notice of proposed Rulemaking in CC Docket No. 96-98.

Dear Office of the Secretary:

Enclosed please find the Illinois Commerce Commission's Initial Comments to the Second Further Notice of proposed Rulemaking in CC Docket No. 96-98. I have included an original and twelve copies. Additionally, I have mailed copies to the International Transcription Service and to the Common Carrier Bureau.

I would appreciate acknowledging receipt of the filing by returning a duplicate time stamped copy of this letter in the enclosed self addressed, stamped envelope.

Thank you for your attention to this matter.

Sincerely,

Myra L. Karegianes
General Counsel

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

In Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

COMMENTS OF
THE ILLINOIS COMMERCE COMMISSION

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Executive Summary

The Illinois Commerce Commission provides the Federal Communications Commission with its comments regarding the interpretation of § 251(d)(2), including identification of unbundled network elements ("UNEs") on a nationwide basis, the interpretation of the "necessary" and "impair" standards that should be used for unbundling network elements and the criteria that should be used to determine whether a network element is subject to the unbundling obligations of § 251(c)(3) of the Act. The ICC supports establishing a national list of UNEs and allowing states to add to this list. Further, the ICC believes the FCC should be responsible for removing elements from the national list. In addition, the ICC recommends that the FCC utilize criteria similar to those used by the FCC in interpreting Section 10 of the Federal Act as opposed to the Essential Facilities Doctrine for purposes of determining which network elements should be made available to competing LECs. Moreover, the ICC recommends that the FCC not establish sunset provisions for the availability of unbundled network elements at this time. Finally, the ICC supports the FCC's original list of seven UNEs, along with two additional elements: sub-loop unbundling and dark fiber.

I. INTRODUCTION AND OVERVIEW

The Illinois Commerce Commission ("ICC") submits its comments to the Federal Communications Commission ("FCC") in the above captioned proceeding. The ICC is the state regulatory body charged with the regulation of investor-owned telecommunications carriers in Illinois and has previously commented to the FCC in matters related to telecommunications in Illinois.

On April 16, 1999, the FCC issued its Second Further Notice of Proposed Rulemaking ("Second FNPRM") addressing certain provisions of the Telecommunications Act of 1996 ("Act) intended to implement local competition. The FCC seeks comments to refresh the record on various provisions and requirements associated with the unbundling of network elements in response to the U.S. Supreme Court's rejection of a portion of the FCC's plan to unbundle network elements.[1] This matter is of great interest to the ICC, which has taken steps to promote local competition in Illinois since the late 1980s.

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[1] *AT&T Corp., et al. V. Iowa Utils. Bd. Et al.*, 119 S.Ct. 721 (1999).

II. PROVISIONS REGARDING UNBUNDLED NETWORK ELEMENTS

A. The FCC Should Identify a Minimum Set of Unbundled Network Elements that Must Be Unbundled on a Nationwide Basis

The FCC seeks comment on its tentative conclusion that it should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis. Second FNPRM ¶ 14. The ICC supports this conclusion. This conclusion is consistent with § 251(d)(2) of the Act, which directs the FCC to determine initially which network elements should be made available to requesting carriers under § 252(c)(3). 47 U.S.C. § 251(d)(2). The ICC agrees with the FCC that a national unbundled network element ("UNE") list will promote competition in the local exchange market. Second FNPRM ¶ 13. Specifically, a national UNE list would assist the States in conducting arbitrations under § 252(b) and reduce the likelihood of litigation regarding the requirements of § 251(c)(3). Id. The ICC also concurs with the FCC's conclusion that the Supreme Court's decision does not preclude the FCC from establishing a national UNE list.

B. The ICC Supports the FCC's Conclusion that States Should Have the Flexibility to Add Elements to the Minimum National UNE List

The FCC confirms state authority to impose additional unbundling requirements pursuant to § 251(d)(2) of the Act. The ICC notes that individual states may need to impose additional unbundling requirements to address state-specific technical, demographic, or geographic issues. The ICC further notes that a state may determine under State law that additional elements must be unbundled in order to promote competition in its local exchange markets. See, e.g., 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b), (c). For example, the ICC is authorized under state law to require additional

unbundling of noncompetitive telecommunications service based on its determination that additional unbundling is in the public interest and is consistent with the policy goals and other provisions of the Illinois Public Utilities Act. 220 ILCS § 5/13-505.6 (West 1993).

C. The FCC Should Determine Which Elements, If Any, Should Be Removed From the National UNE List

The FCC seeks comment on whether it may delegate to the States the responsibility for removing network elements from a national UNE list, applying the standards of § 251(d)(2) the FCC adopts in this proceeding. Second FNPRM ¶ 38.

It appears that the FCC may delegate to the states the responsibility for removing network elements from a national UNE list. The ICC observes that nothing in the Act expressly precludes the FCC from delegating such authority to the states. In fact, § 251(e)(1) implies that the FCC is authorized generally to delegate its jurisdiction over intrastate matters to the States. See § 251(e)(1) ("*Nothing in this paragraph* shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.") (emphasis added). The ICC recommends, however, that the FCC rather than state commissions determine whether items should be eliminated from the national UNE list for several reasons. First, if individual state commissions were allowed to delete items from the national UNE list during this crucial period of transition in the local exchange market, a competing LEC would be unable to obtain a standardized set of UNEs nationwide. This would, in turn, unduly hinder its ability to offer local exchange service in competition with the incumbent LEC. Second, if the FCC makes the determination of which elements should be removed from the list,

its rationale for removal would be *uniformly* applied. On the other hand, if each state makes its own determination, arguments for removal will be inconsistent from state-to-state, which may lead to increased litigation. Third, allowing state commissions to eliminate elements may delay approval of the Regional Bell Operating Company's ("RBOC's") § 271 applications because the FCC's interpretation of the unbundling requirements set forth in § 271(c)(2)(B)(ii) will likely encompass, at a minimum, those elements included on the national list. If a state commission removes an element from the national UNE list and the incumbent LEC seeks § 271 approval from the FCC, the incumbent LEC may not meet the FCC's requirements if the FCC disagrees with the state commission's assessment that the element was properly removed. Finally, minimum, uniform national standards on unbundling are crucial in resolving disputed issues during inter-carrier negotiations and arbitration proceedings in a timely and consistent manner.

In the alternative, should the FCC decide to delegate to the states the responsibility for removing network elements from a national UNE list, it should review a state's determination that a network element no longer qualifies for unbundling pursuant to § 251(c)(3) under a deferential review standard. Specifically, findings of fact by state commissions should not be disturbed unless deemed arbitrary and capricious.

D. Establishing Standards for Unbundling

In this section, the ICC provides its recommendations regarding the appropriate standards for unbundling network elements. This discussion includes analysis and recommendations regarding the following: (1) the definition of the terms necessary and

impair; (2) principles used to determine if the necessary and impair standards are met; and (3) the impact of the availability of network elements outside the incumbent LEC's network on the incumbent LEC's obligation to unbundle those network elements.

1. Defining the Terms "Necessary," and "Impair"

The FCC seeks comment on the meaning of the terms "necessary" and "impair" as they relate to unbundled network elements and § 251(d)(2) of the Act.

The FCC in its *Local Competition First Report and Order* determined that the "necessary" standard applies to "proprietary" network elements and that the "impair" standard applies to "nonproprietary" network elements. Second FNPRM ¶ 19. The ICC agrees with the FCC's construction of § 251(d)(2) and believes that construction should govern this proceeding.

A well-established tenet of statutory construction holds that "[w]hen a word is not defined by statute, [courts] normally construe it in accord with its ordinary or natural meaning." Smith v. United States, 508 U.S. 223, 228 (1993). In addition, "[c]ommon and ordinary usage may be obtained by reference to a dictionary." United States v. Roberts, 88 F.3d 872, 877 (10th Cir. 1996). Therefore, the ICC recommends that the FCC interpret the terms "necessary" and "impair" in a manner that gives them their common ordinary meanings.

The term "necessary" is defined to mean "that which cannot be dispensed with; essential; indispensable." Webster's Second New Collegiate Dictionary 950 (1982). In its *Local Competition First Report and Order*, the FCC defined a "necessary" network element as one that is a "prerequisite to competition." Second FNPRM ¶ 16. It added

that "in some instances, it will be 'necessary' for requesting carriers to obtain access to proprietary elements...because without such elements the ability of requesting carriers to compete would be significantly impaired or thwarted."

The ICC believes that the FCC's definition of "necessary," as used in § 251(d)(2)(A), is consistent with the term's ordinary meaning and Congress' intent to limit a requesting carrier's access to an incumbent LECs proprietary elements only to those instances essential for competition. For example, a competing LEC's ability to provide service in competition with the incumbent LEC would be significantly impaired or thwarted if it were unable to access the incumbent LEC's existing Operations Support Systems (OSS). An incumbent LEC's OSS are proprietary systems, developed and maintained by the incumbent LEC, enabling the incumbent LEC to order, provision and maintain services for its customers. Without access to those systems, a CLEC's ability to order, provision, maintain, or bill for its telecommunications services in an effective and sustainable manner would be significantly impaired or thwarted. The CLEC would be forced to place orders manually which would require additional time when compared to the incumbents' automated systems. A slower response interval in servicing its customer could negatively impact the CLECs influence in the market. As a result, access to an incumbent LEC's OSS is necessary within the meaning of § 251(d)(2).

The term "impair" is defined to mean "to make worse by or as if by diminishing in some material respect." Webster's Ninth Collegiate Dictionary 574 (1984); see Black's Law Dictionary 752 (6th ed. 1990) (defining impair to mean "to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner."); *Humana Inc. , v. Forsyth*, 119 S. Ct. 710, 717 (1999). In defining "impair" for purposes

of § 251(d)(2)(b), the FCC should apply its ordinary meaning and require that an incumbent LEC unbundle a nonproprietary network element where a competing LECs ability to offer a telecommunications service in a competitive manner is materially diminished in value without access to that element.

For example, if a new carrier is required to provide and install its own loop facilities, that carrier will experience a material increase in its cost of providing service in the form of large up front installation costs and a delay of time in competing in the market. Further, replication of the incumbent LEC's loop facilities is labor intensive and requires time consuming activities such as route planning and acquiring access to rights-of-way. Clearly, these factors would materially diminish the competing LEC's ability to offer service in competition with the incumbent LEC. Also, the CLEC may lack the experience necessary to provision the facilities and could improperly install the cable and protective devices and create a safety hazard to its customers, as well as providing an inferior connection. Therefore, allowing a new carrier to utilize the incumbent's cable plant will spur competition by reducing the capital expenditure required for the CLEC, shorten the time frame required for market entry, and possibly reduce safety hazards.

2. Standards to Use to Determine Necessary and Impair

The FCC asks commenters to describe the "essential facilities" doctrine and how it should be applied, if at all, to the determination of which network elements incumbent LECs must provide on an unbundled basis. Second FNPRM at ¶ 22. In addition, the FCC seeks comment on alternative standards that it should consider in determining

which network elements must be unbundled. Id. at ¶ 23.

There are four elements to the essential facilities doctrine: (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983). Under the essential facilities doctrine, a facility is considered essential when two conditions are met: (1) an alternative facility is unavailable or unduly expensive to construct and (2) the facility is central to the competitor's viability in the market. *Antitrust Law* at 773. While the essential facilities doctrine may provide some guidance as to whether or not a network element should be unbundled, it cannot be relied upon as the only standard. The essential facilities doctrine is usually applied to markets with significantly more competition, or less concentration, than the unbundled network element market. Further, the doctrine's scope is limited to identifying and addressing improper monopolistic conduct violative of antitrust laws. These limitations, therefore, must be acknowledged when applying the doctrine to an analysis of unbundled network elements.

For these reasons, the ICC recommends that the FCC utilize factors consistent with those the FCC has utilized in interpreting Section 10 of the federal Act. Specifically, the FCC should utilize the following factors relative to the unbundled network element market: (1) nature of market participants; (2) market share; (3) the demand elasticity of customers; (4) the supply elasticity of the market; and (5) the carrier's cost, structure, size and resources. The ICC believes these factors would be

useful in the analysis of market dominance with respect to UNE requirements because they would provide a more accurate measure of the constantly shifting telecommunications landscape.

In paragraph 37 of the Second FNPRM, the FCC seeks comment on whether the incumbent LEC should bear the burden of demonstrating to the FCC that a particular network element no longer need be unbundled. The ICC recommends that the burden of proof should be placed on the incumbent LEC to prove that a network element need not be unbundled. Conversely, a CLEC should carry the burden of proof to add a new network element to the national UNE list.

3. Availability to Elements Outside the Incumbent LEC's Network

In paragraph 14, the FCC seeks comment on "whether states may, consistent with the Supreme Court's decision, apply [the FCC's] interpretation of § 251(d)(2) to determine in the first instance that a network element need not be unbundled in light of the availability of that element outside the incumbent's network in that state." In AT&T v. Iowa Utilities Board, 119 S. Ct. 721 (1999), the Supreme Court held that § 251(d)(2) "requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act." Id. at 734. The Court stated that § 251(d)(2) requires the FCC "to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." Id. at 736. Thus, § 251(d)(2), as construed by the Court, mandates that the availability of elements outside the incumbent LEC's network be a part of the "necessary" and "impair' standards.

In resolving open issues in arbitrations under § 252(b), state commissions must "ensure that such resolution and conditions meet the requirements of § 251, including the regulations prescribed by the Commission pursuant to § 251." 47 U.S.C. 252(c)(1). The Supreme Court's decision does not preclude States from determining in the first instance that a network element need not be unbundled if that element is available outside the incumbent LEC's network. Where the FCC determines under § 251(d)(2) that a particular network element must be unbundled, state commissions, in arbitration proceedings, will evaluate whether that network element need not be unbundled based on its availability outside the incumbent's network, guided by the standards and criteria adopted in this proceeding. Under § 252(e)(6) parties aggrieved by the state commission's determination made under § 252 can obtain review of such determination in federal district court. The FCC, however, has no authority to review state commission determinations made in arbitration proceedings under § 252.

The ICC believes that the availability of a network element outside of the incumbent's network, in and of itself, should not exempt an incumbent LEC from its unbundling duties under § 251(c)(3) for at least two reasons. First, competing LECs are not required to make their network elements available to competing carriers on an unbundled basis or use forward-looking costs and prices for their UNEs. As a result, it would be erroneous to assume that the mere presence of a network element outside an incumbent LEC's network is an indication that a competing carrier will have access to it on an unbundled basis or at forward looking prices. This erroneous assumption would lead to a situation where a competing LEC would have to exit the market or in the alternative be required to build those "assumed available" network elements before

being able to purchase the remaining network elements from the incumbent LEC and offering service. Such a result is inconsistent with Congress' and the FCC's intent to promote competition in the local exchange market. It also contradicts Congress' and the FCC's conclusion that a CLEC need not own any facilities to purchase UNEs from an incumbent LEC. Most importantly, it would thwart competitors' ability to offer service in competition with a local exchange carrier.

E. The FCC's National UNE List Should Include the Original Seven UNEs and an Additional Two Elements

In its *Local Competition First Order and Report,* the FCC established a list of seven unbundled network elements that must be unbundled on a national basis: the local loop, network interface devices, local and tandem switching, interoffice transmission facilities, signaling network and call related databases, operation support systems, and operators services and directory assistance. The ICC recommends that the FCC re-establish the original minimum list of seven network elements. In addition, the ICC recommends that the FCC include the following elements: sub-loop unbundling and dark fiber. Each element and the explanation for its inclusion appear below.

Local Loops

The local loop is the wiring and cabling from the companies' central office to the customer's premise. The local loop consists of feeder cable, distribution cable, and the customer's drop cable. The tremendous costs (due to the labor intensive activities necessary to install the loop facilities) required for a competitor to replicate these outside plant facilities could exclude a competitor from entering the market place due to

the labor intensive activities required to install the loop facilities. Further, although alternative connections are available such as "cable" and wireless technologies, the current *modus operandi* is through use of traditional twisted pair installed owned and maintained by the local exchange carrier for the provisioning of communications services to its customers.

Network Interface Devices

The network interface device provides a point of interconnection between the local exchange carriers communications facilities and the customers equipment at the customer's premise. The network interface device also provides both grounding of the local loop and fuse protection which reduces the possibility of electrical hazards caused by lightening and power surges. This element is required if the local loop is unbundled for both demarcation and protection.

Local and Tandem Switching

In order to provide a level of competition by CLECs, the switch must be unbundled. The local switch provides a communications path for call completion by routing the call internally or directing the call to other switches for processing. Also, the switch provides access to emergency services, allows for basic and sophisticated communications and use of a montage of beneficial features. Although a CLEC may eventually desire to provision its own switching equipment, access to the incumbents switching hierarchy is required as a stepping stone to market entry. The substantial capital that is required for a CLEC to provide its own switching facilities may deter many carriers from entry into the market. If the CLECs can utilizes the incumbents switching

facilities and build a customer base, that carrier may eventually provision its own switch and offer an increased level of competition. Even if the CLEC only resells the services of the incumbent LEC, consumers will still have multiple carriers to choose from for the provisioning of service.

Interoffice Transmission Facilities

Interoffice transmission facilities consist of the cabling and facilities required in order to transmit between local exchange carrier central offices. In order for a CLEC to replicate this element, a vast expenditure would be required by the new company in provisioning the facilities between various central offices. Use of the incumbent's interoffice transmission facilities will allow a CLEC to utilize the incumbent's facilities without a major up-front expense.

The ICC also recommends that shared/common transport be included on the unbundled network element list as part of the interoffice transmission facilities. The shared transport facility would integrate other elements for use by a new carrier for the transmission of calls between end offices and tandems. Although, some incumbent LECs have been reluctant to allow for the combining of elements, the ICC has determined that utilization of the incumbent LEC's interoffice transmission facilities and switching signaling and related databases is required for the completion of a call. Further, as with the local loop, an incumbent's replication of this in-place network would be extremely costly thereby posing an impediment to competition.

Signaling Network and Call-Related Databases

The signaling network and call-related databases are necessary to provide the intelligence to transmit voice and data communications. Access to the incumbent LEC's network on an unbundled basis is required by the competitive carriers in order to compete in the market place. In its most rudimentary form, signaling is required in order to set up and tear down a call. Also, signaling is required to determine which path will be taken in order to complete the call. Further information can be transferred to support database related applications such as Caller ID and 800 number routing.

Operations Support Systems

The operations support systems are used for the ordering, repair, maintenance and billing of telecommunications services. CLECs use of these systems allows the new carriers to access the incumbent LEC's infrastructure for the provisioning of service and repairs for the CLEC's customers. OSS can also record the incumbent LEC's activities and be used as a means of comparison of service activities between the incumbent LEC and CLEC to ensure that discrimination is not occurring.

Operator Services and Directory Assistance

Use of the incumbent LEC's operator service and directory assistance is required in order to provide an access to alternative means of billing and call completion and access to the incumbent LEC's number database.

Sub-Loop Unbundling

Sub-loop unbundling was approved by the ICC in its interconnection rule, Administrative Code Part 790. Sub-loop unbundling will allow a new carrier to select

which segment of the loop it wishes to provision itself and which portion it wishes to obtain from the incumbent. For example, a CLEC may desire to place the facilities from a customer's building to the incumbent's feeder facilities. This flexibility will be beneficial to the new carriers from an installation time frame stand point as the CLEC can, for example, provide its own facilities where construction is uncomplicated and tie those facilities to the incumbent LEC's plant where facilities have already been in place. However, the ICC recognizes that an interconnection standard must be set to insure customer safety. The ICC is currently in the process of rewriting its Administrative Code Part 790 to ensure that the public safety will not be affected due to a lack of standards in the interconnection of facilities between carriers.

Dark Fiber

The ICC also recommends that dark fiber should be provided as a network element. "Dark fiber" is fiber optic cable connecting parts of a telephone network. It is "dark" because it is not currently connected to electronic equipment needed to power, or "light," the fiber. Dark fiber is customarily employed by incumbent LECs to provide telecommunications services. Like access to the local loop, access to dark fiber is critical to CLECs seeking to enter the local market and compete for the provision of advanced telecommunications services.

F. The FCC Should Not Establish a Sunset Provision

In paragraphs 11 and 39 of its Second FNPRM, the FCC seeks comment on an approach that would allow sunset or modification of the unbundling obligations as technology and market conditions evolve over time. The ICC does not recommend the

FCC implement sunset provisions regarding the UNEs contained in the national list. In the three years since the implementation of the Act no incumbent LEC has satisfied the competitive checklist established in § 271. Given the current state of competition, the ICC believes that determining a date certain or sunset date for the elimination of UNEs from the national list would be extremely difficult. The ICC recommends that instead of establishing a sunset provision, the FCC should establish a date certain when it should review the national list of UNEs. Alternatively, if the FCC decides on a sunset provision regarding UNEs, then the ICC recommends that the FCC seek state input on the date certain for when the national UNE list needs to be altered in any way.

III. Conclusion

For the reasons set forth herein, the ICC recommends that the FCC take into consideration the above recommendations:

1) Implementation of a national UNE list;

2) FCC should determine which elements should be removed from the national UNE list;

3) The ICC concurs with the FCC's *Local Competition First Report and Order* with respect to defining the terms *proprietary*, *necessary*, and *impair*;

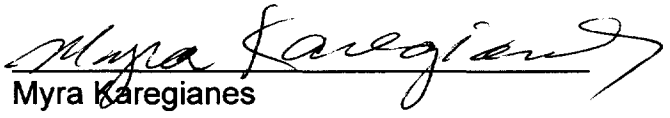
4) The ICC does recommend using the Essential Facilities Doctrine as the only standard to determine which UNEs incumbent LECs must provide on an unbundled basis, but instead utilize factors consistent with those the FCC has utilized in interpreting Section 10 of the federal Act;

5) The ICC does not recommend establishing sunset provisions; instead the FCC should revisit the national UNE list at a date certain; and

6) The ICC recommends that the national UNE list should contain the following elements:
    - Switching
    - Signaling, call-related databases
    - OSS

- Operator service and directory assistance
- Loops
- Network Interface devices
- Interoffice transmission
- Sub-loop
- Dark Fiber

Respectfully submitted,



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Illinois Commerce Commission